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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

DORA MAYER and SIMON MAYER,

Libelants-Petitioners,

against

ZIM ISRAEL NAVIGATION CO. LTD.,

Respondent-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners, Dora Mayer, a disabled steamship passenger, and Simon Mayer, her husband, respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit in the above entitled matter, which affirmed the decree of the United States District Court for the Southern District of New York, entered in favor of respondent dismissing the libel, and from the order of said United States Court of Appeals which, with one judge vigorously dissenting, denied their petition for rehearing.

The Opinions of the Courts Below

The opinion ("Findings of Fact, Conclusions of Law, Opinion") of the United States District Court for the Southern District of New York (Archie O. Dawson, D. J.), dated June 1, 1960, dismissing the libel herein (Appellants'

Appendix below, p. 14(a)), printed in the Appendix hereto, *infra* page 11a, is unreported.

The first opinion of the United States Court of Appeals for the Second Circuit (Clark, Waterman and Friendly, C. J.'s, by Judge Friendly), printed in the Appendix hereto, *infra* page 1a, together with the decision of said Court denying the petition for rehearing, and the dissenting opinion of Clark, C. J., printed in the Appendix hereto, *infra* page 7a, are reported in 289 Fed. 2d 562, 564.

Jurisdiction

The original decision and decree of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered December 29, 1960.

The undersigned was substituted as proctor for libelants by order of said Court of January 11, 1961. By order of said Court of January 23, 1961 appellants' time for filing a petition for rehearing was extended to February 14, 1961; by order of said Court of January 27, 1961 libelants-appellants were permitted to file four typewritten copies of the appendix, petition and additional excerpts from the Record; and by order of said Court of February 14, 1961 appellants' time for filing petition for rehearing was extended to March 16, 1961.

On March 16, 1961 libelants-appellants filed with said Court their petition for rehearing appeal pursuant to order permitting the same to be made on typewritten papers, and new typewritten appendices.

On April 10, 1961 the said United States Court of Appeals for the Second Circuit ordered that counsel for appellee file an answer to the petition for rehearing on or before April 19, 1961, "particularly as to point II-4, P. 10 of Appellants' petition for rehearing but without limitation to same".

On April 17, 1961 the said Court made an order extending the time for appellee to file an answer to the petition for rehearing until May 3, 1961. On May 2, 1961 respondent-appellee filed its answer to libelants-appellants' petition for rehearing.

On May 17, 1961 the decision (with Judge Clark dissenting) and order of the said United States Court of Appeals for the Second Circuit was made denying said petition.

The case was brought against a steamship company for damages for injury to a steamship passenger on board the vessel in navigable waters, and for damages to her husband for loss of consortium, and is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

The jurisdiction of this Court to review by writ of certiorari, the decree and order complained of is conferred by 28 U. S. C. § 1254(1) and 2101(c).

Questions Presented

A

1. When a case in admiralty involving issues of causative negligence and contributory negligence of the parties is tried by a District Court without a jury, is it necessary to the District Court's determination of such issues, and to affirmance thereof upon review by a United States Court of Appeals, that the District Court, or the reviewing United States Court of Appeals, make, in sufficient detail and exactness to indicate the factual basis, under the evidence, for the ultimate conclusion of such issues, adequate findings of subsidiary and basic facts on which can rationally be predicated the Court's holding that either party is guilty or not guilty of causative negligence or contributory negligence?

2. Are the District Court's "holdings" that libelant's injury "was caused by her own negligence in trying to descend the ladder which was in place" and "was not proximately caused by any negligence of the respondent" and that negligence of the libelant "contributed to her injury and contributed to the extent of 100 per cent, and that the injury was entirely due to her negligence and not to the negligence of the steamship company", conclusory and inadequate in the absence of findings, in sufficient detail and exactness, of subsidiary and basic facts relied on by the Court as establishing libelant's negligence, respondent's lack of causative negligence, and negligence of libelant which contributed to the extent of 100 per cent to her injury?

3. Whether the "clearly erroneous" rule is inapplicable to such "holdings" because they are conclusory, inadequate to constitute findings of fact, and not supported by adequate findings of fact.

4. Whether, nevertheless, such holdings, if considered as findings, are inadequate and clearly erroneous.

5. When an elderly woman passenger, upon boarding a passenger vessel, is assisted by a steward on to an upper berth from which, after briefly resting thereon, she wishes to descend, in order to protest to the Captain, and there is no bell or other means provided by which she can summon a steward to assist her, is her act of trying to descend from the upper berth the intervention of a new and proximate cause of her falling such as to justify a holding that her injury in falling was "caused by her own negligence in trying to descend the ladder which was in place"?

6. Where the fact that libelant fell from the upper berth in attempting to descend therefrom and was grievously injured is not disputed, but libelant testified that the steward who had assisted her on to the bunk had used a movable

ladder, which was still in the cabin and which she was attempting to reach when she fell, and respondent introduced photographs taken long subsequently and showing a ladder then affixed at the head of the bunk, and testimony broadly that "all" upper bunks had a ladder affixed thereto, but without testimony of any witness who saw libelant attempt to descend from the berth or fall therefrom, or who saw or could remember whether the ladder to her bunk was affixed, can the Court's statement that "the Court accepts the testimony of respondent's witnesses that the ladder was in place and was not removed, and that the injury to Mrs. Mayer was caused by her own negligence in trying to descend the ladder which was in place", constitute an adequate finding to absolve respondent, in the absence of any further or subsidiary finding or evidence of negligence on the part of libelant, and in absence of any findings or evidence to show that a ladder affixed at the head of the bunk had been called to libelant's attention or that it afforded an adequate and safe means for an elderly woman such as libelant to descend from the bunk?

7. Where respondent failed to call the steward "Yitzhuk", who had accompanied libelant to the cabin and assisted her in ascending to the berth, and the only steward, Gerhard, who was called by respondent relied for his testimony that "all" ladders were attached on his opinion that the ship would not leave Haifa without a ladder affixed and on his belief that the chief steward and second steward always go through all the cabins before passengers are taken on, and one of the passengers called by respondent testified that she did not look at Mrs. Mayer's ladder and the other testified that she could not remember whether the ladder on Mrs. Mayer's bunk was attached or could be moved, was the trial Court's holding that "the ladder" was affixed clearly erroneous?

8. Whether the District Court's assertion or finding that "it would be utter nonsense" and "would have required a

contortionist" for a person lying with her head toward the porthole to reach the movable ladder from that position with the left hand, is clearly erroneous, and erroneous as matter of law and physical fact.

9. Do not respondent's own photographs, showing a ladder affixed at the head of the bunk, but with an intervening side board at that point rising above the surface of the bunk, so as both to obstruct or prevent view of the fixed ladder by one lying on the bunk, and to require a difficult and awkward climbing over this board to get on such ladder from the bunk, themselves require findings to show whether the Court held that thereby an adequate and safe means was provided for libelant to descend from the bunk or that such evidence of respondent itself showed a negligent failure by respondent to provide any adequate and safe means for an elderly woman such as libelant to descend from the bunk?

B

10. Are the findings inadequate for lack of any finding upon the issue of unseaworthiness?

11. Did the District Court err (a) in holding that, "Since we are dealing here with a passenger rather than a seaman, the warranty of seaworthiness is not as broad as it would be in the case of a seaman's action"; and (b) in failing to hold that the vessel was unseaworthy by reason of (1) failure to provide at libelant's bunk a bell or other means of calling a steward, and (2) failure to provide an adequate and safe means for an elderly woman such as libelant to descend from the bunk.

C

12. Are the findings inadequate for lack of any finding respecting respondent's failure to heed Mrs. Mayer's request to be put ashore at Haifa?

13. Did the Court of Appeals err in holding that this was not reversible error because there was no evidence that this "aggravated the injury"?

D

14. Was the trial court's conduct prejudicially impatient, harsh, arbitrary and threatening during libelant's testimony, and arbitrary and unreasonable in reciting and giving controlling importance to a possibly exaggerated description of her treatment immediately following the injury?

15. Did the Court of Appeals err in applying the "witness' demeanor" rule and "clearly erroneous" requirement to the District Court's statement that "Mrs. Mayer's story" as to rotation of her leg and "Mrs. Mayer's testimony" as to her being pulled along the floor were "utterly inconceivable", and "cast doubt on all of Mrs. Mayer's testimony in the entire case"?

General Admiralty Rule Involved

Rule 46½ of the Rules of Practice in Admiralty and Maritime Cases promulgated by this Court provides:

> "46½. FINDINGS OF FACTS AND CONCLUSIONS OF LAW— In deciding cases of admiralty and maritime jurisdiction the Court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record, and, if an appeal is taken from the decree, shall be included by the Clerk in the record which is certified to the Appellate Court under Rule 49".

Statement of the Case

Mrs. Mayer boarded respondent's vessel, S.S. ISRAEL at Haifa, Israel, as a passenger for a voyage to New York. Cabin 302 on said vessel was a dormitory or tourist cabin having four upper berths and four lower berths. The "Price charged for upper berth was same as price charged for lower berth" (par. 9 of Respondent's answer to libelant's interrogatories). In purchasing the ticket she asked for a lower berth ticket and was told that she would have a lower berth. The ticket itself (Respondent's Exhibit A, p. 25a of Brief and Appendix for Respondent-Appellee below) recites "class dormitory" and "cabin 302 D".

Upon arriving on board, she was shown to cabin 302 by steward "Yitzuk", who designated the upper berth which is inside the door as her berth. Passengers were already in the room claiming occupancy of the other berths, and steward Yitzuk told her that the upper was berth D. She protested, but desiring to rest briefly, was assisted by steward Yitzuk on to the upper berth. She testified that he used a movable ladder in assisting her on to the upper berth, and then placed it near the foot of the berth. The foot end of the berth was toward the entrance door, the head end of the berth being toward a porthole, so that as she lay with her head at the head end of the berth her right side was toward the wall and her left side outside. (As respects this arrangement see Respondent's Exhibits B-1, 2, 3, 4, 5; pp. 26a-35a of Brief and Appendix for Respondent-Appellee below.)

After briefly resting she awoke from dozing as the vessel was pulling away from the dock. Being dissatisfied with her berth she decided to go and speak to the captain.

Indisputably there was no bell by which she could summon a steward while on the upper berth. At the trial

Court's own questioning, respondent's witness Gerhard testified (S. M. p. 146):

> "The Court: Where was the steward's bell?
>
> The Witness: The steward's bell is next to the door.
>
> The Court: There is no bell in the upper berth?
>
> The Witness: No, your Honor.
>
> The Court: You have to get down to the floor to look for it?
>
> The Witness: Yes."

The other passengers in the cabin were standing at portholes looking out as the vessel started to leave Haifa.

Mrs. Mayer testified that she saw the movable ladder which the steward had used leaning near the foot end of the berth and she sat up and reached with her left hand attempting to get hold of the ladder and in doing so lost her balance and fell to the cabin deck.

As was finally ascertained when she was placed in a hospital in Naples, the neck of the left femur was fractured with proximal dislocation, and she had to undergo two operations in Naples and subsequent operations in New York, with a pin placed in her hip in Naples and operations in New York to replace this. She spent five months in a plaster cast and at the time of trial continued to receive hydro-therapy treatments. As stated in the Trial Court's opinion:

> "Mrs. Mayer still has pain in her hip, in her back and a stiff left knee and a stiff hip. She undoubtedly suffers considerably from the injury. She has been unable to do her regular housework and to get around in a normal way. The condition from which she suffers may be long continued. In fact, the evidence of Dr. Reisman was that it would be a permanent partial disability" (*infra* p. 16a).

Mrs. Mayer testified that as she lay on the floor screaming the "ship's doctor" (there was no proof that he was a doctor, nor of his qualifications) rotated her leg several minutes in an alleged effort to ascertain if it was fractured. The Trial Court recites that he "manipulated her left leg to ascertain if it was fractured" (*infra* p. 14a) but that "Mrs. Mayer's story that he rotated the left leg for a number of minutes seems utterly inconceivable under the circumstances" (*infra* p. 14a).

Mrs. Mayer asked the doteor why he did not take an X-ray. He said there was no X-ray aboard the ship (S. M. p. 22) and that

> "I said immediately, 'Dr. Efriam, please, take me'—we had not left the harbor yet—'please take me to Haifa; I have two uncles who are doctors in Israel.
>
> I gave the names of my uncles, Dr. Cohen and Barakov in Tel Aviv" (S. M. 23).

He said that he would have to ask the captain. Her request was refused by the captain (S. M. pp. 24-25).

Neither the Steward Yitzuk nor Dr. Efriam were called. No respondent's witness testified to seeing Mrs. Mayer fall. Two passengers testifying for respondent, Mrs. Seckbach and Mrs. Strauss both testified that the steward involved was Yitzuk (S. M. pp. 178, 186). Although the Trial Court treats them as testifying that the ladder to Mrs. Mayer's bunk was fixed, Mrs. Seckbach, in answer to that specific question testified:

> "This I couldn't remember exactly" (S. M. p. 172) and "I don't know exactly" (S. M. p. 177).

And Mrs. Strauss testified that she did not go and look at Mrs. Mayer's ladder (S. M. p. 186) "but I think when one ladder you can't remove, all the ladders are in the same position" (S. M. p. 185).

Gerhard, one of the stewards, on whose testimony respondent's photographs were introduced, stated that he could not be sure whether they accurately presented the condition with respect to the ladders of the various bunks in January, 1956 (S. M. p. 145).

These photographs taken long after the accident were introduced by respondent to refute petitioner's claim that a movable ladder was used. But as will be seen clearly from Respondent's Exhibit B-5, page 35a of Respondent's Appendix below, there are holes indicative that a ladder had been fixed at two prior points, once at the foot of the berth and once in the center thereof, before the fixed ladder shown in the photographs was placed in its present position. A respondent's witness testified indeed that a fixed ladder originally had been at the foot end of the berth, but had been removed because it interfered with the opening of the door, and that it was for this reason that a fixed ladder was finally placed at the head end rather than the foot end of the berth.

As these photographs also show, the ladder at the head of the berth when the pictures were taken is below a side board extending approximately half the length of the berth and more than a foot beyond each of the sides of the ladder and rising above the surface of the bunk so as to make it both (1) difficult or impossible for anyone lying on the upper berth to see such a ladder, and (2) dangerously difficult and awkward for anyone to attempt to climb on to from the upper berth. (See Judge Clark's dissenting opinion, *infra* p. 8a.)

Notwithstanding that Mrs. Mayer's left side would be at the outer side of the bunk and consequently her left arm would be at the outer side of the bunk, the Trial Court held that:

"It would be utter nonsense" for a person lying in that position "to reach with her left hand for the ladder"

and "would have required a contortionist to reach the ladder from that position with the left hand" (*infra* p. 14a).

So reasoning, and erroneously treating the testimony of steward Gerhard and "a passenger" as being that "the ladders" were permanently affixed, the trial Court declined "to accept the testeimony of Mrs. Mayer as to the happening of the accident or as to the cause of the accident" (*infra* p. 14a).

As stated in Judge Clark's dissenting opinion below, the Trial Court thus "assumed that the respondent would be absolved if its version as to the placement of the ladder were accepted" (*infra* p. 9a).

This overlooks the fact that the photographs introduced by respondent themselves show a dangerous and unsafe condition making descent from the upper berth unreasonably difficult and awkward, and thus, instead of absolving respondent of negligence, "The evidentiary basis for recovery was established at trial, through the respondent's own witnesses, and its disregard would seem to be plain error" (Clark, C. J., dissent, *infra* p. 9a).

The Court of Appeals affirmed on the theory that it was not "clearly erroneous" for the Trial Court to refuse to accept "Mrs. Mayer's version of the cause of the accident" (*infra p.* 3a). And that notwithstanding the fact that "He did not discuss the claim that respondent breached its duty by failing to heed Mrs. Mayer's request to be put ashore", nor "make a finding on that issue" this was not reversible error "for there was no evidence that this aggravated the injury".

The Court of Appeals entertained a petition for rehearing, requiring respondent to reply thereto, but denied the same with a vigorous dissenting opinion by Judge Clark (*infra* p. 7a) holding that the District Court's decision and its affirmance under the circumstances involved "plain error" and that the Court should "reverse and

remand for findings in the light of whatever additional evidence is thought necessary bearing on the questions whether respondent was negligent in its placement of the ladder and whether this negligence proximately caused libelant's injuries" (*infra* p. 9a).

REASONS FOR ALLOWANCE OF THE WRIT

By superficial and inadequate conclusory holdings, without findings or evidence of subsidiary facts to support the same, and the failure to apply the correct rule of the duty owed by a carrier to a passenger, a judgment of dismissal has been rendered herein which is not only gravely unjust but violative of Admiralty Rule 46½ and contrary to controlling decisions of this Court and applicable decisions of other United States Courts of Appeal.

This Court has repeatedly emphasized the necessity in admiralty cases for adequate findings of fact in compliance with Admiralty Rule 46½, and in other cases of law or equity tried by the Court without a jury.

In *Dalheite* v. *United States*, 346 U. S. 15, 25, in holding inadequate a "finding" of "negligence" this Court said in footnote 8:

> "Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied. *Kelly* v. *Everglades Drainage District*, 319 U. S. 415, and cases cited. Otherwise their findings are useless for Appellate purposes. In this particular case, no proper review could be exercised by taking the 'fact' findings of 'negligence' at face value. And, to the extent that they are of law, of course, they are not binding on appeal."

In *Kelly* v. *Everglades Drainage District*, 317 U. S. 415 there cited, the Court, *per curium*, said that "there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated" (319 U. S. 480) and that "there must be findings, stated either in the Court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion" (319 U. S. 422).

In *Commissioner* v. *Duberstein*, 363 U. S. 278, 292, 293 where, in holding "that the findings were inadequate" and remanding the case "looking toward new and adequate findings of fact" (363 U. S. 293), this Court recently pointed out that: "there comes a point where findings become so sparse and conclusory as to give no revelation of what the District Court's concept of the determining facts and legal standard may be."

Courts of Appeals of other circuits have applied these principles in reversing decisions on the ground that conclusory recitations therein were inadequate, for lack of adequate findings of supporting facts in *Victory Touring Co.* v. *Bordelon*, 5 Cir., 219 F. 2d 540; *Johnson* v. *United States*, 5 Cir., 256 F. 2d 849; *Schybinger* v. *Italy Steamship Co.*, 7 Cir., 273 F. 2d 307, 314; *Employers Liability Insurance Corp. Ltd.* v. *Weeden*, 5 Cir., 274 F. 2d 809.

Upon examining the District Court's opinion herein with its holdings that Mrs. Mayer's injury was "caused by her own negligence" and "was not proximately caused by any negligence of the respondent" and that Mrs. Mayer's negligence "contributed to her injury and contributed to the extent of 100 per cent and that the injury was entirely due to her negligence and not to the negligence of the steamship company" (*infra* p. 17a) one seeks in vain for any specification showing: What negligence of Mrs. Mayer? What 100 per cent contributory negligence of Mrs. Mayer? And what facts show the absence of any negligence of respondent?

Even the recitation that the injury to Mrs. Mayer "was caused by her own negligence in trying to descend the ladder which was in place" (*infra* p. 16a), is "so sparse and conclusory as to give no revelation of what the District Court's concept of the determining facts and legal standard may be" (*Commissioner* v. *Duberstein*, 363 U. S. 278).

Did he mean that it was negligent of Mrs. Mayer to try to descend the ladder? Or did he mean that because he found there was a ladder in place he assumed it must have been sufficient and she must have been negligent? Or did he mean that in some respect not mentioned in his findings nor shown by any evidence, there must have been on her part some act of negligence in the course of her attempt to descend the ladder?

Or did he mean that if she should undertake to descend from the berth the respondent owed her no duty of providing adequate and safe means therefor?

In *Texas & Pacific Railway Co.* v. *Stewart*, 228 U. S. 357, the testimony of the injured passenger, Mrs. Dora E. Mayer (sic) respecting her fall while attempting to descend the steps of a railway coach was very similar to the testimony of libelant Dora Mayer herein respecting her attempt to descend from the bunk. The Mrs. Mayer of the *Stewart* case after sitting ten or fifteen minutes in a coach became apprehensive she might not be in the right coach. She decided to go out and inquire. Rejecting the argument that this made her own act in doing so the intervening and real cause of her injury, this Court held that "it was not an unusual or improper thing that she, an elderly woman, under such circumstances, should wish to learn for herself whether or not she had taken the right train or car for transportation upon her intended journey" and that in so doing she was "performing acts reasonably and fairly attributable to" the passenger relationship and that "the mere fact that she proceeded in the manner

stated was not of itself the intervention of another and independent cause itself productive of the injury" (228 U. S. 362, 363).

This Court cited *Alabama G. S. Railway Co.* v. *Coggins*, 6 Cir., 88 Fed. 455, where Judge Taft (later Chief Justice Taft) held that a telegraph operator who had been riding on a freight train on a pass, was still a passenger, entitled to the care owed a passenger, after he descended from the freight car and was walking toward a station to inquire respecting telegrams before returning to the freight car and that "the same rules for determining the existence of contributory negligence on his part do not apply as if he were a traveler at a railroad crossing" (88 Fed. 460).

In the *Stewart* (Dora E. Mayer) case, this Court also cited *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 469, 475, where this Court said:

> "The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produces the injury."

Here District Judge Dawson nowhere finds any act on the part of Mrs. Mayer which could be disconnected from her passenger relationship and self-operating to produce the injury.

Under this Court's decisions a carrier undertakes with passengers that "as far as human care and foresight can go, he will transport them safely"; they are entitled to "the greatest possible care" and the carrier is liable "for the slightest negligence or fault" from which injury results to the passenger (*Pennsylvania Co.* v. *Roy*, 102 U. S. 451); the "smallest negligence" will render the carrier liable (*The City of Panama*, 101 U. S. 453, 462-463). The care required "is very high indeed" (*Maibrunn* v. *Hamburg S. S. Co.*, 2 Cir., 77 F. 2d 304).

The decision below, unless reviewed and reversed by this Court, will be a precedent not only destroying this established doctrine of a carrier's high degree of duty to a passenger, but also destroying or confusing unduly the application of Admiralty Rule 46½.

It will operate also to make it profitable for carriers and insurance companies, having no other means of disputing a passenger's claim, to defend by saying that the injury was not caused by precisely the negligence alleged but by different negligence for which in reality the carrier and its insurers should be liable according to their own proof.

The total lack of any consideration or finding as respects the refusal to put Mrs. Mayer ashore at Haifa is also prejudicially erroneous (*Boston & Yarmouth S. S. Co. Ltd.* v. *Francis*, 1 Cir., 249 Fed. 450; *Northern Commercial Co.* v. *Nestor*, 9 Cir., 138 Fed. 383, 387; *The Iroquois*, 194 U. S. 240). There was in fact evidence that the manipulation of her leg, which could have been avoided by putting her ashore at Haifa probably aggravated the bone and muscular injuries. But whether this was so or not, she was entitled to a determination by the Court, by proper findings and conclusions, of her claim to damages for the period of enhanced suffering and agony during the trip from Haifa to Naples, which would have been avoided had she been put ashore at Haifa.

The utter failure to make any findings on the issue of unseaworthiness—which, Judge Dawson fully realized, the pre-trial order had directed to be tried (*infra* p. 12a)—was also in clear violation of Admiralty Rule 46½ and the cases above cited.

The holding in *McAllister* v. *United States*, 348 U. S. 19, that the "clearly Erroneous" test under the Civil Rules applies on appeals in admiralty should not be treated as having destroyed the requirements of Admiralty Rule 46½. It should, indeed, be treated as adding emphasis

to the necessity for specific and adequate findings of subsidiary facts, and the inadequacy of conclusory holdings, such as a party's "negligence" or "contributory negligence" or lack of "negligence" to constitute the findings of fact required by Rule 46½.

Even the Second Circuit, differently constituted (Lumbard, Clark and Smith, JJ.) has recently held, in *Kane* v. *Branch Motor Express Co.*, 290 F. 2d 503, 506, that:

> "When a judge sitting without a jury passes on the issue of negligence, his conclusion is freely reviewable on appeal and is not to be tested by the 'clearly erroneous' standard of Rule 52(a), Federal Rules of Civil Procedure."

It cited a similar holding in *Romero* v. *Garcia & Diaz, Inc.*, 2 Cir., 286 F. 2d 347, 355, where the opinion was written by Judge Friendly, who wrote the opinion of affirmance herein (*infra*, p. 2a). In the *Kane* case, the Court said that:

> "This principle is, of course, equally applicable whether the trial judge finds negligence or whether he exonerates the defendant. In either case, the Court of Appeals must decide whether the finding can stand if tested by a properly formulated standard of care."

It has long been treated as "well settled" that an appeal in admiralty is a trial *de novo* (*Reid* v. *Fargo*, 241 U. S. 544). Does the ruling in *McAllister* v. *United States, supra*, 348 U. S. 19, destroy the trial *de novo* doctrine? If, or to the extent that it does supplant the trial *de novo* doctrine by the "clearly erroneous" limitation, does not this again render the more essential full and fair compliance with Admiralty Rule 46½ by making fully adequate findings of fact on all issues and all the evidence, rather than conclusory statements such as "negligence", "contributory negligence" or lack of "negligence" of either party?

In *United States* v. *Ohio Power Co.*, 353 U. S. 98, 99, this Court said that:

> "We have consistently held that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules."

And in *British Transport Com.* v. *United States*, 354 U. S. 129, 139, quoted in *Continental Grain Co.* v. *Barge FBL-585*, 364 U. S. 19, 25, this Court held that:

> "Admiralty practice, which has served as the origin of much of our modern Federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating from other practice."

Reviewing the case as one governed by principles of admiralty and justice, moreover, this Court should determine whether the trial Court's repeated interruptions during Mrs. Mayer's testimony, refusals to allow her to make statements, threats to throw the case out, and other remarks were, considering the physical suffering of this highly nervous woman and her having to testify through an interpreter, so prejudicial to her giving simple testimony, as itself to require retrial before a Judge disposed to show the patience which Mrs. Mayer's physical condition certainly called for in a court of justice.

CONCLUSION

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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CHARLES A. ELLIS,
Of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 121—October Term, 1960.

(Argued December 9, 1960 Decided December 29, 1960.)

Docket No. 26411

DORA MAYER and SIMON MAYER,

Libelants-Appellants,

—v.—

ZIM ISRAEL NAVIGATION CO., LTD.,

Respondent-Appellee.

Before:

CLARK, WATERMAN and FRIENDLY,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Archie O. Dawson, *Judge*, dismissing a libel for personal injuries to a passenger and for loss of services and consortium by her husband. Affirmed.

NATHAN SCHWARTZ, New York, New York, *for Libelants-Appellants.**

* Upon the calendar call, Mr. Schwartz advised us that he had been relieved, and also that he wished the Court to know he was not the author of certain pages of appellants' brief and did not approve the appendix. At our suggestion he remained in the courtroom; when the case was called for argument, he stated appellants had requested him to argue and did . . . The Court commends counsel's conduct under these circumstances.

Appendix.

KIRLIN, CAMPBELL & KEATING, New York, New York (Matthew L. Danahar, Edward J. Hale and Vernon S. Jones, on the brief), *for Respondent-Appellee.*

FRIENDLY, *Circuit Judge*:

Mrs. Mayer embarked at Haifa, Israel, as a passenger on the respondent's vessel, S.S. Israel, destined to New York. She was assigned an upper berth. As the ship was leaving Haifa, she fell from the berth and suffered a serious fracture of the left leg at its junction with the hip. She claims damages for her injuries, as does her husband for loss of services and consortium.

Mrs. Mayer's testimony was that the ladder by which she had climbed to the upper berth was movable and that she fell while reaching for it in order to descend. Her claim appears to be that it was negligent to have a movable ladder, or at least to have one positioned as she stated this to have been, with no instructions given as to how to reach the ladder and no bell available in the upper berth. She testified also that, after the fall, the ship's doctor violently rotated the injured leg for several minutes; that four men then dragged her along the deck to the ship's hospital, where she remained until taken from the boat at Naples for surgery; and that her request to the doctor to be put ashore at Haifa for immediate medical attention was refused. The steward testified that the ladder was permanently affixed to the berth at a place easily reached. Two fellow passengers in the same cabin gave testimony which the judge, in his opinion dictated at the close of the trial, characterized as to the same effect, although cross-examination had developed that their only unqualified assertions related to the ladder which served another berth. And defendant contended that photographs of the cabin showed

it was physically impossible for the ladder to have been where Mrs. Mayer claimed.

Judge Dawson dismissed the libel. He declined to accept Mrs. Mayer's testimony that the ladder was not affixed to the berth. He found her claim as to having been dragged along the deck to be "so utterly inconceivable as to be unworthy of credence" and to cast doubt on all her testimony. He rejected her testimony that the doctor had rotated the injured leg for a number of minutes. He did not discuss the claim that respondent breached its duty by failing to heed Mrs. Mayer's request to be put ashore.

Plainly the trial judge's refusal to accept Mrs. Mayer's version of the cause of the accident and to credit her testimony as to being dragged along the deck was not clearly erroneous. We likewise cannot find it was clearly erroneous to refuse to credit her testimony as to the overly energetic and prolonged manipulation of the injured leg, even though this was uncontradicted and an inference favorable to her might have been drawn from respondent's unexplained failure to produce the testimony of the ship's doctor. For "The witness' demeanor, not apparent in the record, may alone have 'impeached' him." *Broadcast Music, Inc.* v. *Havana Madrid Restaurant Corp.*, 175 F. 2d 77, 80 (2 Cir. 1949). Cf. *Dyer* v. *MacDougall*, 201 F. 2d 265, 269 (2 Cir. 1952). Here, in addition, there was what the judge was warranted in finding to be the incredibility of Mrs. Mayer's testimony as to the dragging and the contradiction of this by other passengers and by her own deposition, as well as statements on her part as to the time she had held her ticket in advance of sailing, as to the duration of the voyage to Naples, and as to the length of her hospitalization there, all of which, to say the least, were proven to be inaccurate in a sense uniformly favorable to her case. We, therefore, do not reach the interesting question whether the decision in *Laubheim* v. *DeK. N. S. M.*, 107 N. Y. 228, 13 N. E. 781

(1887), that "If, by law or choice, the defendant was bound to provide a surgeon for its ships, its duty to the passengers was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty," still represents the common law of New York, or constitutes a correct interpretation of general maritime law[1] applicable to passengers although it surely does not with respect to seamen suing for maintenance and cure or under the Jones Act, see *DeZon* v. *American, President Lines, Ltd.*, 318 U. S. 660, 666-68 and n. 2 (1943).

Neither do we find reversible error in the judge's failure to hold that defendant breached its duty by refusing to heed Mrs. Mayer's request to be put ashore while the boat was still near port at Haifa, or at least to make a finding on that issue; for there was no evidence that this aggravated the injury. Libelant's medical expert could not "say just how much of an effect waiting three days would have" and respondent's expert testified it would have none. Hence we likewise do not reach respondent's claim, decided against it by Judge Cashin on a motion for summary judgment, 177 F. Supp. 69 (S. D. N. Y. 1959), that libelant is barred by a clause in the ticket requiring suit to be brought within a year after the passenger has landed—decision of which would involve the application and validity of the admittedly formal and often subtle distinctions developed from the rule in *The Majestic*, 166 U. S. 375 (1897), by such cases

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[1] No evidence of Israeli law was offered. The judge stated in his oral opinion that "it was stipulated that the Court might decide the issues under the applicable law of New York." Both this remark and the transcript leave us in some doubt whether the stipulation referred to the "common law" of New York, or the law that New York would apply in a maritime matter in a case not governed by a specific foreign law, which as we know now, although it was not known in 1887, would be the general maritime law. See Gilmore & Black, The Law of Admiralty, pp. 374 ff. It does not appear necessary to resolve this.

as *Baer* v. *North German Lloyd*, 69 F. 2d 88 (2 Cir. 1934); *The Leviathan*, 72 F. 2d 286 (2 Cir. 1934); *Maibrunn* v. *Hamburg-American S.S. Co.*, 77 F. 2d 304 (2 Cir. 1935); *Bellocchio* v. *Italia Flotte Riunite*, 84 F. 2d 975 (2 Cir. 1936); *The Kungsholm*, 86 F. 2d 703 (2 Cir. 1936); *Baron* v. *Compagnie Generale Transatlantique*, 108 F. 2d 21 (2 Cir. 1939); *Foster* v. *Cunard White Star, Ltd.*, 121 F. 2d 12 (2 Cir. 1941); *Murray* v. *Cunard S.S. Co.*, 235 N. Y. 162, 139 N. E. 226 (1923); and *Reichman* v. *Compagnie Generale Transatlantique*, 290 N. Y. 344, 49 N. E. 2d 474 (1943).

Judgment affirmed.

Appendix.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of April, one thousand nine hundred and sixty-one.

Present: HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judges.

DORA S. MAYER and SIMON MAYER,

Libelants-Appellants,

—v.—

ZIM ISRAEL NAVIGATION CO. LTD., and
THE S.S. ISRAEL,

Respondents-Appellees.

It is hereby ordered that counsel for the appellee shall file an answer to the petition for rehearing on or before April 19, 1961, particularly as to point II—4, P. 10 of appellants' petition for rehearing but without limitation to same.

A. DANIEL FUSARO,
Clerk.

Appendix.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 121—October Term, 1960.

(Petition for rehearing filed May 2, 1961
Decided May 17, 1961.)

Docket No. 26411

DORA MAYER and SIMON MAYER,

Libelants-Appellants,

—v.—

ZIM ISRAEL NAVIGATION CO., LTD.,

Respondent-Appellee.

Before:

CLARK, WATERMAN and FRIENDLY,
Circuit Judges.

On Petition for a Rehearing

PER CURIAM:

The petition for rehearing is denied, Judge Clark dissenting.

CLARK, *Circuit Judge* (dissenting):

Both the trial court and the original opinion of this court assumed that this case was governed by the question whether libelant's or respondent's account of the position

of the ladder was correct. Libelant testified that she ascended to her upper berth by means of a movable ladder given her by the steward, and that the steward then removed the ladder and placed it next to the door adjacent to her berth. After she was in the berth a period of time, libelant reached out in order to secure the ladder to descend, and fell out of the berth, causing severe injury to herself. A quite different version of the accident was given by respondent, whose witnesses testified that libelant's berth had a permanently affixed ladder. The district court accepted this latter testimony, and concluded that respondent was not negligent and that the sole cause of the accident was libelant's contributory negligence. On appeal, the only asserted error was the trial court's failure to accept libelant's version of the accident. Since there was substantial, indeed persuasive, evidence that the ladder was permanently affixed as described by respondent's witnesses, we affirmed the judgment below.

At this point, plaintiff engaged new counsel and petitioned for rehearing. Our attention was then drawn for the first time to the possibility that, even accepting respondent's account as to the permanent placement of the ladder, respondent was negligent because such placement made access to the ladder unreasonably difficult and awkward. Photographs of libelant's cabin show that the ladder is affixed to the side of the upper berth at the head end of the bunk. Between the ladder and the sleeping surface of the bunk is a sideboard extending more than a foot to the left and right of the ladder and rising above the surface of the bunk. It would seem that the necessity of climbing over this board makes it difficult for a person to get on to the ladder from the upper bunk. Indeed, one of libelant's fellow passengers testified that she and the libelant both had trouble with the bunk because it was a "little complicated."

Appendix.

Thus I think new factual and legal issues have been raised as to whether respondent was negligent in the manner of placement of the ladder and as to whether this negligence proximately caused libelant's injuries. It is clear from the opinion below that the trial court never considered these issues, but rather assumed that the respondent would be absolved if its version as to the placement of the ladder were accepted. In my view, this was error. Accordingly I would reverse and remand for findings in the light of whatever additional evidence is thought necessary bearing on the questions whether respondent was negligent in its placement of the ladder and whether this negligence proximately caused libelant's injuries.

I do not think libelant should be denied relief simply because the above basis for finding respondent negligent was not recognized until rehearing. The evidentiary basis for recovery was established at trial, through the respondent's own witnesses, and its disregard would seem to be plain error. That libelant, a highly nervous woman grievously injured, gave a contrasting account of the accident after periods of understandable stress[1] should not be given controlling importance to the exclusion of this evidence bearing so directly on the primary issue of negligence. That her original lawyer, faced with these difficulties of ascertaining the facts, and with an additional barrier of language (she had to testify through an interpreter), did not quickly grasp the way the trial was shaping up and immediately

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[1] Immediately upon her fall she was taken to the ship's hospital, remaining there under sedatives—"shouting" and "crying," as she testified—for six days until the ship reached Naples, where she was hospitalized for 3½ months, before coming to this country, where she was again hospitalized. Under the circumstances remembrance of the details of her accident—so quickly occurring—might well be fuzzy.

change his theory seems understandable.[2] True, the district judge found her testimony untrustworthy for reasons not closely in point here, since they bore upon her later medical treatment;[3] but I see no reason to penalize her in her claim for damages, since the respondent developed the testimony and obviously cannot be considered as prejudiced by what it itself brought into the case. And the idea that for some procedural reason she should not know be allowed to change her legal theory to conform to the evidence, on an issue well within the terms of her original libel, seems unworthy of a modern court obligated to do justice, rather than merely to vindicate legal procedure.

I therefore dissent from the denial of libelant's petition for rehearing.

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[2] Difficulties of rapport between client and counsel persisted through the argument of this appeal, as is shown by the star (*) footnote of the opinion.

[3] For understandable reasons he did not believe her testimony that the doctor and attendants "pulled her like an animal on the floor." But this exaggerated statement obviously stems from her not unnatural anger at the considerable delay in treatment while the vessel proceeded from Haifa to Naples.

Findings of Fact, Conclusions of Law, Opinion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A. 196-151

DORA MAYER and SIMON MAYER,

Libelants,

vs.

ZIM ISRAEL NAVIGATION CO., LTD.,

Respondent.

JACOB RASSNER, Esq., and FRANKEN, KRAMER & BAN, Esqs., Proctors for Libelants; Foster Bam, Esq., of Counsel.

KIRLIN, CAMPBELL & KEATING, Esqs., Proctors for Respondent; Matthew Danahar, Esq., of Counsel.

DAWSON, J.:

The Court will now dictate its opinion, findings of fact and conclusions of law.

This is a libel in admiralty tried by the Court without a jury.

A pretrial order was entered in this matter on April 20, 1960, by Judge Sugarman.

The first two issues to be tried under that order were these:

(1) Were the libelant Dora Mayer's injuries proximately caused by any negligence of the respondent?

(2) Did any negligence of the libelant Dora Mayer contribute to the injuries, and if so, to what extent?

Appendix.

The third issue is: Did the respondent breach any warranty of seaworthiness?

Since we are dealing here with a passenger rather than a seaman the warranty of seaworthiness is not as broad as it would be in the case of a seaman's action.

The first issue that the Court has to decide is whether the injury which Mrs. Mayer undoubtedly suffered was due to the negligence of the steamship company.

No matter how badly a person gets injured they cannot recover unless they can show that the fault is on the part of somebody who caused the injury. In other words, you have, first of all, the question of liability. Is the injury the result of negligence or is it not? A person may be very badly injured and not recover anything unless they can show that the injury was the result of the fault of the person they are suing, and that is a fair rule, because it is a very serious matter to take money away from one person and give it to another, and can only be done if the person from whom the money is taken is responsible for the injury.

So the first question the Court has to decide is whether the injuries that Mrs. Mayer suffered were caused by the negligence of the steamship company or its agents.

Now, the evidence in the case shows the following facts:

That on January 6, 1956, Mrs. Mayer boarded the Steamship Israel at Haifa. She had a ticket for an upper berth in cabin 302 in that vessel. Cabin 302 was what is known as a dormitory cabin having four upper berths and four lower berths in the cabin.

After Mrs. Mayer entered the cabin and had her baggage checked she apparently went up the ladder to the upper berth which was assigned to her and rested in that upper berth.

At about 3:30 p.m. on that day the ship pulled out of the dock at Haifa. Mrs. Mayer decided that she would like to

leave the upper berth in which she was resting. She said she was determined to go to the captain and complain about having been given an upper berth. And she apparently decided to leave the upper berth for that purpose.

Mr. Mayer's testimony is that after she had got up into the upper berth the steward who had been in the cabin when she went to the upper berth removed the ladder to the upper berth and put it to one side, by the side of the door out of reach of her when she was in the upper berth.

This is vigorously contested. The testimony of the room steward who was on this voyage and who had been well acquainted with the ship ever since it was first put into commission was that all the ladders in the upper berths in that room were permanently affixed and could not be removed.

The testimony of a passenger in the same cabin with Mrs. Mayer at the time of the accident was that the ladders were permanently affixed.

The Court accepts the testimony of the steward and this other passenger that the ladders were permanently affixed.

Mrs. Mayer's story that the steward had removed the ladder and put it out of reach does not ring true as against all the other evidence in the case. The very design of the cabin shows that there would not have been room between the berth and the door to put the ladder in an inaccessible place. If it was put right next to the berth Mrs. Mayer could have reached that ladder. And if it was put so far away that she could not reach it from the upper berth, it would have blocked the door, which is not a probable situation.

The Court also takes note of the fact that when Mrs. Mayer first went to a doctor in the United States for treatment and gave a history of the accident to this doctor, the doctor's notes indicate that Mrs. Mayer said to the doctor that she fell on a ladder on the ship, not that she

fell because there was no ladder. That statement made at a time when no litigation was contemplated it seems to me is of considerable significance.

At any rate, Mrs. Mayer said that she reached out with her left hand trying to reach the ladder. She claims that she was lying in the upper berth with her head toward the porthole and her feet toward the door and then leaned out, stretching out with her left hand to reach for the ladder. Any examination of the makeup of this cabin would show that it would be utter nonsense for a person lying in the position that Mrs. Mayer said she was lying to reach with her left hand for the ladder if it was in the position that she says it was. It would have required a contortionist to reach the ladder from that position with the left hand, and any normal person would have moved up in the berth toward the door and reached for the ladder with her right hand.

I am not inclined to accept the testimony of Mrs. Mayer as to the happening of the accident or as to the cause of the accident.

In any event, Mrs. Mayer fell out of her berth at about 3:30 p.m. on January 6th. Various other passengers in the cabin were in the cabin at that time looking out of the porthole. None of them apparently saw the fall but they heard it. They went to Mrs. Mayers assistance, called the doctor and nurse. The doctor came in and examined her. He apparently manipulated her left leg to ascertain if it was fractured.

Mrs. Mayer's story that he rotated the left leg for a number of minutes seems utterly inconceivable under the circumstances.

Mrs. Mayer then testified that the doctor after having rotated the leg for a couple of minutes arranged for four people to pull her out of the cabin. She testified that these

people grabbed her and pulled her like an animal on the floor.

The testimony of the steward and the other passengers was that the doctor and nurse got a stretcher and she was carried on the stretcher from the cabin to the ship's hospital.

I believe that Mrs. Mayer's testimony that four people on a ship would pull an injured woman along the floor is so utterly inconceivable as to be unworthy of credence and casts doubt on all of Mrs. Mayer's testimony in the entire case.

Mrs. Mayer then was in the ship's hospital for approximately three days, from January 6th to January 9th, when the ship arrived in Naples. There Mrs. Mayer was removed from the ship and taken to the International Hospital in Naples, which she entered on January 9. She remained there until April 22, 1956. She was admitted as having a fracture of the neck of the left femur with proximal dislocation. She was operated on in that hospital. A pin was apparently put in her leg. In fact, there were two operations performed in the Naples Hospital.

When she left the hospital on April 22 she came by plane to New York where her sons and husband were living. She there entered the St. Albans Hospital where she remained from May 15, 1956 to May 24, 1956. In that hospital they felt it was impossible to perform immediate operation on her thigh because of the fact that she had an infection and therefore they postponed any operation.

She then came under the care of Dr. Victor Raisman who put her in the Kew Gardens Hospital in New York City where she remained from March 26, 1957 to July 5, 1957. She there was operated on by Dr. Raisman on two occasions to correct the condition of the pin in her leg and to give her a better union.

After she got out of the hospital she spent some five months in a plaster cast. She has subsequently been receiving hydrotherapy treatments.

Mrs. Mayer still has pain in her hip, in her back and a stiff left knee, and a stiff hip. She undoubtedly suffers considerably from the injury. She has been unable to do her regular housework and to get around in a normal way. The condition from which she suffers may be long continued. In fact, the evidence of Dr. Raisman was that it would be a permanent partial disability.

Libelant proved the following hospital medical expenses: the bill of Dr. Raisman, $1,260; Kew Gardens Hospital bill, $3,094.33; the bill of Dr. Lipton, $750; the bill of St. Albans Hospital, $14; Silver's Baths for hydrotherapy treatment, $200; Hospital for Special Surgery, examination $25; taxis and transportation, $200.

Simon Mayer, husband of Mrs. Mayer, testified as to lack of consortium and the fact that it has become necessary for him to do most of the work around the house. His damages, and, in fact, the damages of Mrs. Mayer would be obvious and substantial if liability was established.

Since this was an injury occurring on an Israeli ship in Israel waters, and under a ticket for transportation bought in Israel, the test of liability would be Israeli law. No evidence was introduced by either side as to Israeli law on this subject, and it was stipulated that the Court might decide the issues under the applicable law of New York. No authority has been advanced by libelant to show that the absence of a ladder from an upper berth is proof of negligence of the steamship company. However, the Court accepts the testimony of respondent's witnesses that the ladder was in place and was not removed, and that the injury to Mrs. Mayer was caused by her own negligence in trying to descend the ladder which was in place.

Therefore, the Court holds on the first issue that libelant Dora Mayer's injury was not proximately caused by any negligence of the respondent.

On the second issue the Court holds that the negligence of the libelant Dora Mayer contributed to her injury and contributed to the extent of 100 per cent, and that the injury was entirely due to her negligence and not to the negligence of the steamship company.

Under those circumstances there is nothing for the Court to do but to render a verdict for the respondent.

The Court therefore directs that the libel be dismissed and that a decree be entered for the respondents with costs.

This opinion will constitute the findings of fact and the conclusions of law.

Let the decree be entered accordingly.

Mr. Bam: The libelants, your Honor, for the record, most respectfully except to your Honor's findings and conclusions and move for a new trial on the ground that they are contrary to the weight of the evidence.

The Court: Your motion is denied and your exception is noted.

I may say I have not dealt with the question of the limitation of liability on the ticket because I think that becomes unnecessary and superfluous. I have decided the issue on the facts.

Settle decree on notice.

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U. S. D. J.

Dated, New York, June 1, 1960.